RECORD AND BRIEFS

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No. 15-8049

IN THE

Supreme Court of the United States

Duane Edward Buck,
Petitioner,
v.

William Stephens, Director, Texas Department of Criminal Justice,
Criminal Institutions Division,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Director waived procedural bars and confessed error in several other cases where Dr. Walter Quijano testified that a defendant's race might contribute to a jury's finding of future dangerousness. *See Saldaño v. Cockrell*, 267 F.Supp.2d 635, 639–40 & n.3 (E.D. Tex. 2003). The Director acknowledges that it is always inappropriate for the State to ask jurors to consider a defendant's race when assessing guilt or imposing punishment, but in Buck's case that is not what happened. Defense counsel both called Dr. Quijano as a witness and sponsored the challenged testimony; thus, this case has always stood apart. *See Buck v. Thaler*, 132 S. Ct. 32, 34 (2011) (Alito, J., respecting the denial of certiorari) ("In four of the six other cases ., the prosecution called Dr. Quijano and elicited the objectionable testimony. In the remaining two cases while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross–examination."). Nevertheless, how best to argue for Buck's life presented a difficult task for trial counsel given the violence Buck wrought on the morning of July 30, 1995, without regard for the children in the house, and his behavior in the immediate aftermath. Approaching the case in "relatively oblique and impersonal terms" based on "clinical and statistical data on the question of future dangerousness" was a reasoned strategy decision. *Granados v. Quarterman*, 455 F.3d 529, 535 (5th Cir. 2006).

Having unsuccessfully sought relief pursuant to Federal Rule of Civil Procedure 60(b) in 2011, Buck tried again in 2014. The intervening event was this Court's decision that a procedurally barred claim of ineffectiveness could be overcome with a showing that state habeas counsel was ineffective. Together with trial counsel's alleged ineffectiveness, Buck suggested that this new development should now afford him Rule 60(b) relief because the combination created "extraordinary circumstances." The lower courts rejected his arguments, finding not only that he still had not shown "extraordinary circumstances," but also that he failed to establish constitutionally ineffective assistance at trial.

This procedural posture gives rise to the following question:

> Where a petitioner has failed to establish *both* that reasonable jurists would debate the procedural ruling *and* the denial of a valid constitutional right, did the lower court err in denying a COA?

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BRIEF IN OPPOSITION

Petitioner Duane Edward Buck was found guilty and sentenced to death for murdering Kenneth Butler and Debra Gardner—a mother of two whom Buck shot while her young children watched—during a shooting spree at the home where Debra and her children lived, and where Buck had lived during his and Debra's (tumultuous) relationship. During the punishment phase of Buck's trial, Dr. Quijano, testifying for the *defense*, explained that he considered several factors when evaluating the defendant, including age, sex, race, socio–economic status, and whether there was a history of violence and/or substance abuse. Regarding race, Dr. Quijano testified only that "minorities, Hispanics and blacks" were overrepresented in the criminal justice system. He never tied Buck's race (African–American) to his future dangerousness. The State briefly revisited this testimony on cross–examination, and then never mentioned it again. Ultimately, although he concluded that Buck would not be a future danger if given a life sentence, Dr. Quijano admitted that he "never rule[d] out any probability "[1]

Having unsuccessfully challenged trial counsel's effectiveness for allowing Dr. Quijano's to testify the way he did (first via a federal habeas

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[1] Importantly, Dr. Patrick Lawrence, the other defense expert on future dangerousness, made the same admission: there were "no guarantees." 28 Reporter's Record (RR) 167

petition and later a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b)), in 2014, Buck again sought Rule 60(b) relief. This time, he argued that *Martinez v. Ryan*[2] and *Trevino v. Thaler*[3] demand that his procedurally–barred ineffectiveness claims be looked at anew The district court denied his motion, and the Fifth Circuit declined to issue a COA. This appeal follows.

STATEMENT OF THE CASE

I. The Facts of the Crime

The Fifth Circuit accurately summarized the facts of Buck's crime as follows:

> Early on the morning of July 1995, Buck's ex–girlfriend, Debra Gardner, and several of her friends, including Kenneth Butler, his brother, Harold Ebnezer, and Buck's sister, Phyllis Taylor, gathered at [Debra's] house after having spent the previous night playing pool. Buck and [Debra] had ended their relationship about one week earlier. At some point that morning, Buck arrived at the residence, banged on the front door, and kicked it open, after which he argued loudly with [Debra] and struck her before retrieving some of his possessions and leaving.
>
> Several hours later, Buck returned with a rifle and shotgun. After forcing the front door open, Buck fired at—but missed—[Harold], who immediately fled the house through the back door. Buck then approached [Phyllis], pressed the muzzle of the rifle directly against her chest, and fired. [Phyllis] fell to the ground but survived her injuries. As she lay on the ground, [Phyllis] heard

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[2] 132 S. Ct. 1309 (2011).

[3] 133 S. Ct. 1911 (2013).

> several more gunshots coming from the area of the bedrooms. When [Phyllis] was able to stand up and make her way through the house, she discovered [Kenneth's] body slumped over and bleeding in the hallway After hearing the first gunshots, Devon Green, [Debra's] then 11–year–old son who had been sleeping in the back bedroom, hid in the hallway closet. From his hiding place, [Devon] listened as Buck confronted [Kenneth] in the hallway and accused him of sleeping with Buck's "wife." Gunshots followed. Both [Devon] and his teenage sister, Shennel Gardner, ran outside, where they witnessed Buck shoot their mother as she attempted to flee in the street.
>
> Buck then placed both guns in the trunk of his car, which was parked outside [Debra's] residence, and attempted to start the vehicle. When his car did not start, Buck began walking away from the residence. Police arrived just as he was leaving, and both [Devon] and [Harold] identified him as the shooter. Police then took Buck into custody and recovered a shotgun and .22 caliber rifle from the trunk of his car. Both [Debra] and [Kenneth] died from their gunshot wounds.

Buck v. Thaler, 345 F App'x 923, 924–25 (5th Cir. 2009), *cert. denied*, 559 U.S. 1072 (2010).

II. Facts Relating to Punishment

A. The State's case for future dangerousness

At the punishment phase, the State presented evidence that Buck would likely be a future danger. Specifically, the jury heard about Buck's prior criminal history, including convictions for delivery of cocaine, possession of a controlled substance, and unlawfully carrying a weapon. 28 Reporter's Record (RR) 5–28; *see also id.* at 239–43; State's Exhibits (SX) 66–68. Vivian Jackson, Buck's former girlfriend, testified about her own encounters with Buck; she

"testified that Buck had physically abused her on several occasions and once threatened her with a gun." *Buck v. Thaler*, 345 F App'x at 925; *see* 28 RR 31–40. Most damning, however, was the description of Buck's post–arrest behavior—that he was laughing and said "the bitch got what she deserved"—from the arresting officer.[4] 28 RR 50–51.

B. The defense's case in mitigation

Despite Buck's shooting spree during which he killed two and wounded a third (his own sister), his criminal record, and his history of domestic violence, the defense attempted to portray Buck as nonviolent and unlikely to be a future danger. In support of its case, the defense called several witnesses, each of whom testified that they had never known Buck to be violent. 28 RR 77 (Pastor J.C. Neal), 84–85 (Monique Winn, Buck's sister), 93 (Sharon Buck, Buck's step–mother), 96 (James Buck, Buck's father). Buck also called two expert witnesses, each of whom testified that, if imprisoned, Buck would not likely commit additional acts of violence: Dr. Walter Quijano, the chief psychologist for the Texas prison system, 28 RR 101–02, and Dr Patrick Lawrence, a psychologist specializing in the prediction of future criminal behavior, *id.* at 177, 182–85. The heart of their testimony was their opinion

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[4] The jury had already heard that Buck was laughing after being arrested during the trial on guilt/innocence. 26 RR 317 (testimony of Shennel Gardner, Debra's daughter).

that Buck did not pose of continuing threat to society and was therefore a good candidate for a life sentence. These opinions were based on various factors—including Buck's age, the facts of the crime for which he was on trial, and the prison environment. *Id.* at 109–19 (Dr. Quijano), 186–206 (Dr. Lawrence).

Counsel took pains to emphasize Dr. Quijano's extensive experience, especially his tenure as Chief Psychologist and Director of Psychiatric Services for the Texas Department of Criminal Justice. *Id.* at 101–04. Throughout his direct examination, counsel stressed that Dr. Quijano lacked either a pro–defense or a pro–prosecution bias, eliciting testimony that he had testified for the defense and the State. *Id.* at 104–05. In short, defense counsel's primary reason for calling Dr. Quijano was his strategic calculation that the jurors would perceive him to be a fair and unbiased expert who had independently concluded—after evaluating all of the factors he considered relevant (age, sex, race, social economics, history of violence, and history of substance of abuse)—that there was only a very low probability of future dangerousness. *Id.* at 115; *see Buck v. Thaler*, 345 F. App'x at 925 ("Buck and his counsel presumably made this strategic decision because they believed that the potential benefit of Dr. Quijano's ultimate conclusion—that Buck was not likely to pose any future danger to society if he were incarcerated—outweighed any risk of exposing the jury to Dr. Quijano's less favorable opinions.").

III. Direct Appeal and Postconviction Proceedings

Having been indicted for the shooting death of Kenneth Butler and Debra Gardner during the same criminal transaction, Buck was found guilty and sentenced to death. Clerk's Record (CR) 12. Buck's sentence and conviction were affirmed on direct appeal. *Buck v. State*, No. 72,810 (Tex. Crim. App. 1999) (unpublished).

While his direct appeal was pending, Buck filed an application for state habeas relief. SHCR–01[5] 77 The state habeas court issued findings of fact and conclusions of law recommending that relief be denied. *Id.* at 126–27 Before the findings were issued—but after the filing deadline had passed—Buck filed a second state habeas application in which he challenged Dr. Quijano's testimony for the first time,[6] some two and a half years after former Attorney General John Cornyn confessed error in *Saldaño*.[7] SHCR–02 2. The state habeas court found this to be a subsequent application, and pursuant to state

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5 "SHCR" refers to the Clerk's Record of documents and pleadings filed during the state habeas proceedings, followed by "–01" (the first application) and "–02" (the second application) and relevant page numbers.

6 Specifically, Buck alleged (1) that Dr. Quijano's testimony violated his Sixth Amendment right to an impartial jury, the Eight Amendment's prohibition against cruel or unusual punishment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and (2) that trial counsel was constitutionally ineffective for eliciting Dr. Quijano's opinion that minorities are overrepresented in the criminal justice system. SHCR–02 55–62.

7 *See Saldaño v. Cockrell*, 267 F.Supp.2d at 639.

law, directed the district clerk to forward it to the Court of Criminal Appeals. *Id.* at 18–19. That court then disposed of both writ applications, adopting the trial court's findings and conclusions as to the first and denying it on the merits and dismissing the second as an abuse of the writ pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5. *Ex parte Buck*, Nos. 57,004–01, –02 (Tex. Crim. App. Oct. 15, 2003) (per curiam) (unpublished order).

Thereafter, Buck sought federal habeas relief,[8] but the district court granted the Director's motion for summary judgment and denied Buck's request for COA. *See Buck v. Stephens*, Civil Action No. 4:04cv03965 (S.D. Tex. 2006), Docket Entry (DE) 15. The Fifth Circuit also denied a request for a COA.[9] *Buck v. Thaler*, 345 F App'x 923. In so doing, the court not only accepted the procedural bar, it also found the merits of the constitutional claim to be lacking. *Id.* at 930.

More than five years later, and relying primarily on the alleged broken promise made by the former Attorney General, on the eve of his scheduled execution, Buck sought relief from judgment pursuant to Federal Rule of Civil

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[8] In his federal habeas petition, Buck asserted the same claims regarding Dr. Quijano's testimony that he had raised in his state habeas application. *See Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 1 at 55–62.

[9] Buck sought a COA only a single claim: "whether he was deprived of due process or equal protection by the prosecution's reference to Dr. Quijano's testimony citing race as a future dangerousness factor." *Buck v. Thaler*, 345 F App'x at 926.

Procedure 60(b). *Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 27 The district court again rejected his claims. *Id.*, DE 31. A subsequent Rule 59(e) motion was also denied. *Id.*, DE 33, 36. Appeals to the Fifth Circuit and this Court were also unsuccessful.[10] *See Buck v. Thaler*, 452 F App'x 423 (5th Cir. 2011);[11] *Buck v. Thaler*, 132 S. Ct. 32 (2011).[12]

In 2014, based primarily on *Martinez* and *Trevino*, Buck again asked the federal district court to grant federal habeas relief on his ineffectiveness claims regarding Dr. Quijano's testimony, or at the very least, grant his motion so that he could further develop the record.[13] His motion pursuant to Federal Rule of Civil Procedure 60(b), *Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 49, and his motion pursuant to Federal Rule of Civil Procedure 59(e), *id.*, DE 67, were both denied, *id.*, DE 66, 75.[14] The Fifth Circuit declined to issue a COA,

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[10] This Court granted a stay of execution to consider Buck's petition for certiorari review. *Buck v. Thaler*, No. 11A297 (Sept. 15, 2011).

[11] The court reiterated its previous denial of the merits of Buck's constitutional claim. *Buck v. Thaler*, 452 F 'Appx at 432.

[12] A petition for rehearing after the denial of certiorari review was also denied. *Buck v. Thaler*, 132 S. Ct. 1085 (2012).

[13] Prior to seeking Rule 60(b) relief, Buck pursued state habeas relief alleging, *inter alia*, violations of due process and equal protection based on Dr. Quijano's testimony. The Court of Criminal Appeals found this to be an abuse of the writ. *Ex parte Buck*, 418 S.W.3d 98 (Tex. Crim. App. 2013), *cert. denied*, 134 S. Ct. 2663 (2014).

[14] Both times, the district court found Buck's claim that he was denied constitutionally ineffective assistance of counsel to be without merit. *See Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 66 at 11–15; *id.*, DE 75 at 4.

finding that the district court had not abused its discretion. *Buck v. Stephens*, 623 F. App'x 668 (5th Cir. Aug. 20, 2015). Buck's petition for rehearing en banc was also denied. *Buck v. Stephens*, 2015 WL 6874749 (5th Cir. Nov. 6, 2015).

REASONS FOR DENYING CERTIORARI REVIEW

The question Buck presents for review is unworthy of the Court's attention. Supreme Court Rule 10 provides that review on writ of certiorari is not matter of right, but of jurisdictional discretion, and will be granted only for "compelling reasons." An example of such a "compelling reason" would be if the court of appeals entered a decision of an important question of federal law that conflicts with a decision of another court of appeals or with relevant decisions of this Court. Buck advances no such special or important reason in this case, and none exists.

Further, as a jurisdictional prerequisite to obtaining appellate review, Buck was first required to obtain a COA. 28 U.S.C. § 2253(c)(1)(A); *Miller–El v. Cockrell*, 537 U.S. 322, 335–36 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000). The standard to be applied in determining when a COA should issue examines whether a petitioner "has made a substantial showing the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Miller–El*, 537 U.S. 336. This standard "includes showing that reasonable jurists could debate (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement

to proceed further." *Slack*, 529 U.S. at 484 (internal quotation marks and citation omitted); *cf. Harrington v. Richter*, 562 U.S. 86, 101 (2011) ("A state court's determination that the claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision.") (citation omitted).

As the lower court explained:

> The district court denied the motion for a procedural reason, namely Buck's failure to show extraordinary circumstances under Rule 60(b)(6). We therefore must deny a COA if Buck fails to establish *both* (1) that jurists of reason would find debatable "whether the petition states a valid claim of the denial of a constitutional right" *and* (2) that those jurists "would find debatable whether the district court was correct in its procedural ruling." *Slack* [], 529 U.S. [at] 484, [].

Buck v. Stephens, 623 F. App'x at 671–72 (emphasis added). Importantly, because the procedural decision was the denial of a 60(b) motion, Buck had to show that the district court abused its discretion in so doing. *See Kellogg v. Strack*, 269 F.3d 100, 104 (2d Cir. 2001) (per curiam); *see also Hernandez v. Thaler*, 630 F.3d 420, 428 (5th Cir. 2011) ("The decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will only be reversed for an abuse of that discretion." (internal quotation marks and citation omitted).

For the reasons discussed below, Buck has entirely failed to establish that he was entitled to a COA. Thus, certiorari review is not warranted.

I. Because Buck Failed to Establish "Extraordinary Circumstances," the Lower Court Properly Denied a COA.

While considered a "grand reservoir of equitable power to do justice," Rule 60(b) relief is only available if "extraordinary circumstances" are present. *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (internal quotation marks and citation omitted). But "[s]uch circumstances will rarely occur in the habeas context." *Id.* Here, in addition to previously rejected facts Buck has argued as "extraordinary circumstances"—counsel's ineffectiveness and the alleged "broken promise" made by former Attorney General Cornyn—he has added only the change in decisional law pursuant to *Martinez* and *Trevino*.[15] These cases change nothing.

As a preliminary matter, Buck makes mutually exclusive arguments when contending that the lower court erred in its consideration of whether he had demonstrated "extraordinary circumstances." First, he states unequivocally, "The panel's *sole inquiry* should have been whether a reasonable jurist could conclude that Mr. Buck's [ineffectiveness] claim is remarkable, or that Texas's broken promise is not just 'odd and factually unusual,' but extraordinary." Petition at 25 (emphasis added). Then he says

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[15] Additional factors not specifically argued in Buck's previous motion for relief from judgment include: (1) the trial court qualified Dr. Quijano as an expert, allowed him to testify as he did, and admitted his "excludable hearsay report linking race to dangerousness," and (2) the "Fifth Circuit held Mr. Buck's trial counsel responsible for the introduction of Dr. Quijano's testimony." *Compare Buck v. Stephens*, 623 F. App'x at 672, *with Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 27 at 6–15.

that the lower court erred because it did not follow an "equitable, holistic approach" and consider *all of the circumstances together*, but instead "went through the factors one by one, and determined that each was not extraordinary; and, in so doing, dilut[ed] [the] full weight of the circumstances identified by Mr. Buck." *Id.* at 27 (emphasis added, internal quotation marks and citation omitted). He cannot have it both ways. In any event, if each circumstance standing alone is not extraordinary, the combination of them cannot be extraordinary.

A. A change in decisional law is not an "extraordinary circumstance."

Buck's ineffectiveness claim is procedurally barred because the Court of Criminal Appeals dismissed it as an abuse of the writ. When he first raised this claim in federal court, no case held that cause and prejudice could be shown by establishing state habeas counsel's ineffectiveness. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991) (explaining that because there is no constitutional right to postconviction proceedings, there can be no attendant right to effective assistance of counsel in those proceedings). But "[i]t is hardly surprising that, subsequently, after petitioner's case was no longer pending, this Court arrived at a different [conclusion]."[16] *Gonzalez*, 545 U.S. at 536. For

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[16] Thus, Buck's contention that his ineffectiveness claims were procedurally barred during his initial federal habeas proceedings can hardly be considered "extraordinary." *See Buck v. Stephens*, 623 F. App'x at 673; *see also Gonzalez*, 545

this reason, a change in decisional law cannot be an "extraordinary circumstance." *Id.* As the lower court explained in *Adams v. Thaler*:

> Our precedents hold that "[a] change in decisional law after entry of judgment does not constitute exceptional circumstances and is not alone a ground for relief from final judgment" under Rule 60(b). *Bailey v. Ryan Stevedoring Co.*, 894 F.2d 157, 160 (5th Cir. 1990) (citations omitted); *see also Batts v. Tow–Motor Forklift Co.*, 66 F.3d 743, 747–48 (5th Cir. 1995). We have held that "[t]his rule applies with equal force in habeas proceedings under the Antiterrorism and Effective Death Penalty Act (AEDPA). *Hernandez* [], 630 F.3d [at] 430 []; *see Hess v. Cockrell*, 281 F.3d 212, 216 (5th Cir. 2002) ("Under our precedents, changes in decisional law . . . do not constitute the 'extraordinary circumstances' required for granting Rule 60(b) relief. . . . The dicta in *Batts* suggesting that the rule for changes in decisional law might be different in the habeas corpus context because finality is not a concern is now flatly contradicted by, among other things, AEDPA.").

679 F.3d 312, 319–20 (5th Cir. 2012). *Adams* then specifically rejected the argument that *Martinez* constituted an "extraordinary circumstance" warranting Rule 60(b)(6) relief. *Id.* at 320; *see also Diaz v. Stephens*, 731 F.3d 370, 375–77 (5th Cir.) (holding that *Trevino* "does not change [*Adams*'s] conclusion in any way"), *cert. denied*, 134 S. Ct. 48 (2013).[17]

U.S. at 537 ("The District Court's interpretation was by all appearances correct under the Eleventh Circuit's then–prevailing interpretation of 28 U.S.C. § 2254(d)(2).").

[17] The *Gonzalez* Court explained that the decisional change in the law at issue there was "all the less extraordinary in petitioner's case because of his lack of diligence in pursuing" an appeal. 545 U.S. at 537. The same could be said of Buck. *Trevino* was handed down on May 25, 2013. Buck waited until January 2014 (despite the fact that nothing else about the circumstances of his case has changed since 2002) to pursue relief from judgment under Rule 60(b); instead, he chose to pursue state habeas relief. *See Ex parte Buck*, 418 S.W.3d 98.

B. The additional factors listed by Buck are not extraordinary.

Primarily, the lower court rejected the notion that a claim of ineffective assistance of counsel makes a case extraordinary. *Id.* at 673 ("Buck's case is no different in kind or degree from other disagreements over trial strategy between a lawyer and client that it counts as an exceptional case."). In his petition, as he has in every pleading before every court, Buck asserts that his is not an ordinary claim of ineffectiveness, however, because trial counsel inserted race into the proceedings, which "undermined the integrity of both [Buck's] death sentence and the criminal justice system overall." He then castigates the panel for not acknowledging this, as well for not acknowledging race. Petition at 24, 28, 30, 32. But as explained below, this claim has been repeatedly and exhaustively reviewed by the lower courts. And at every turn, the underlying facts have been found insufficient to warrant relief. If Buck cannot obtain relief on the merits of this argument, then he surely cannot establish that constitutes an "extraordinary circumstance."

Buck also relies, as he has in every pleading before every court, on his argument that the Texas Attorney General broke a promise to allow Buck to be resentenced. *Id.* at 25, 32–33. First, as the lower court recognized, this "fact has never been adequately established." *Buck v. Stephens*, 623 F App'x at 673; *see also id.* at 670 n.1 ("[W]e have found no statement by the AG in the record

in which he confessed error relating to Buck's case and promised not to raise procedural defenses."). The court further explained that Buck has never shown "why the alleged reneging would justify relief from judgment;" "he has not shown that he relied on the alleged promise to his detriment." *Id.* at 10; *see Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 31 at 8 (in denying his first Rule 60(b) motion, district court explained that "Buck has identified no legal basis for a claim that the Attorney General's statement created legally enforceable rights or that it precluded the Attorney General from later identifying distinguishing facts that made their initial assessment inapplicable to this case."), DE 75 at 10; *see also Ackerman v. United States*, 340 U.S. 193, 198 (1950) (affirming the denial of Rule 60(b) relief because, among other things, petitioner "had no right to repose confidence in Kelley, a stranger. There is no allegation of any fact or circumstance which shows that Kelley had any undue influence over petitioner or practiced any fraud, deceit, misrepresentation, or duress upon him. There are no allegations of privity or any fiduciary relations existing between them."). Second, a federal habeas petitioner has no right to have the State respond to his allegations in a particular way *Cf. Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981); *see Buck v. Thaler*, 345 F App'x at 929 ("Because Buck's characterization of 'intra–court comity' finds no support in our precedent, *we decline to apply here concessions*

made by the State in different cases with different facts.") (emphasis added).

More than that, however, Buck's case is *not* like any of the others cited by former Attorney General Cornyn: "In four of the six other cases ., while the defense called Dr. Quijano, the objectionable testimony was not elicited until the prosecution questioned Dr. Quijano on cross–examination. Only in Buck's case did defense counsel elicit the race–related testimony on direct examination. Thus, this is the only case in which it can be said that the responsibility for eliciting the offensive testimony lay squarely with the defense."[18] *Buck v. Thaler*, 132 S. Ct. at 34–35 (Alito, J., respecting the denial of certiorari).

Because Buck cannot establish the "extraordinary circumstances" necessary for Rule 60(b) relief, the district court did not abuse its discretion in denying relief, and the Fifth Circuit properly affirmed that denial. Certiorari relief is, therefore, not warranted.

II. Buck Has Not Established a Valid Claim of the Denial of a Constitutional Right, that is, He Has Not Established Ineffective Assistance of Trial Counsel.

Even if reasonable jurists could debate whether the lower court abused its discretion in denying Buck's Rule 60(b) motion, in order to be entitled to a

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[18] *See Alba v. Johnson*, 232 F.3d 208 (5th Cir. 2000); *Blue v. Johnson*, Civil Action No. 99cv0350 (S.D. Tex. Sept. 29, 2000); *see also Buck v. Stephens*, Civil Action No. 4:04cv03965, DE 33 at Exhibit 2 (excerpt of reporter's record from *State v. Blue*), Exhibit 3 (excerpt of reporter's record from *Alba v. State*).

COA, he must also establish the denial of a valid constitutional claim. This he cannot do.

A. The *Strickland* standard

The Sixth Amendment, together with the Due Process Clause, guarantees a criminal defendant both the right to a fair trial and the right to effective assistance of counsel at that trial. *Strickland*, 466 U.S. at 684–86. A defendant's claim that he was denied constitutionally effective assistance requires him to affirmatively both that (1) counsel rendered deficient performance, and (2) counsel's actions resulted in actual prejudice. *Id.* at 687–88, 690. Importantly, failure to prove either deficient performance or resultant prejudice will defeat an ineffective–assistance–of–counsel claim, making it unnecessary to examine the other prong. *Id.* at 687

In order to demonstrate deficient performance, Buck must show that in light of the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," i.e., "prevailing professional norms." *Id.* at 688, 690; *see also Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam) (emphasizing that the "performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances") (citation omitted). The Supreme Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential," with "every effort" made to avoid "the distorting effects of

hindsight."[19] *Strickland*, 466 U.S. at 689; *Richter*, 562 U.S. 105 ("It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.'") (citations omitted); *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.") (citations omitted). Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Even if deficient performance can be established, Buck must still affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This requires him to show a reasonable probability that but for counsel's deficiencies, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one sufficient to undermine confidence in the outcome. *Id.* As explained by *Richter*: The question concerning *Strickland*'s prejudice analysis "is *not* whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been

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[19] "Representation of a capital defendant calls for a variety of skills. Some involve technical proficiency connected with the science of law. Other demands relate to the art of advocacy. The proper exercise of judgment with respect to the tactical and strategic choices that must be made in the conduct of a defense cannot be neatly plotted in advance by appellate courts." *Stanley v. Zant*, 697 F.2d 955, 970 & n.12 (11th Cir. 1983).

established [had] counsel acted differently." 562 U.S. at 111 (emphasis added and citation omitted). Rather. "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112 (citation omitted).

Finally, with respect to errors at the sentencing phase of a death penalty trial, the relevant prejudice inquiry is "whether there is a reasonable probability, that absent the errors, the sentencer [] would have concluded the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

B. Trial counsel was not deficient.

Buck contends that trial counsel was deficient in two ways. First, counsel allowed Dr. Quijano to testify knowing that one of the factors he considered in assessing future dangerousness was a defendant's race. Second, no objection was made either when the State revisited the issue during cross–examination or when the State asked the jurors to consider Dr. Quijano's testimony during closing argument. *See, e.g.*, *Buck v. Stephens*, Civil Action No. 4:04cv03956, DE 49 at 19–21.

While the law rightly imposes multiple restrictions on the State's ability to introduce evidence, far fewer restrictions are imposed on the defendant. *See United States v. Fairchild*, 505 F.2d 1378, 1383 (5th Cir. 1975) (explaining that many, if not most, "[c]onstitutional rights, like others, may be waived; and a criminal defendant may, by his conduct, make other constitutionally

inadmissible evidence admissible for certain purposes") (citation omitted). For example, a criminal defendant might wish to rely on apparently unseemly or inappropriate evidence, i.e., poverty or culture, to explain a poor choice, even when the State would not be permitted to argue those factors as either evidence of guilt or aggravating for purposes of sentencing. *See Tuilaepa v. California*, 512 U.S. 967, 983 (1994) (Stevens, J., concurring) ("In [*Zant v. Stephens*, 462 U.S. 862, 885, 887–89 (1985)], even though the trial judge had incorrectly characterized the defendant's prior history of 'assaultive offenses' as a statutory aggravating circumstance, we found no constitutional error because the evidence supporting that characterization was relevant and admissible.

We made it clear, however, that it would be error for the State to attach the 'aggravating' label to, or otherwise authorize the jury to draw adverse inferences from, 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process, such as for example the race, religion or political affiliation of the defendant.'"). To prohibit a defendant from choosing to use such factors could improperly limit his ability to present a defense or a case in mitigation.

Here, the defense's decision to elicit testimony from its own expert reflected a considered choice and a strategic legal decision. *See Buck v. Thaler*, 345 F App'x at 930 ("Buck and his counsel presumably made this strategic determination because they believed that the potential benefit of Dr. Quijano's

ultimate conclusion—that Buck was not likely to pose any future danger to society if incarcerated—outweighed any risk of exposing the jury to Dr Quijano's less favorable opinions."); *see also Granados*, 455 F.3d at 536 ("These are difficult and nuanced decisions the trial lawyer must make."). While the State cannot, and should not, raise the issue of race, defense counsel can and, in fact, has chosen to do so before. The Fifth Circuit held that under those circumstances, any later attempt to claim it as a basis for appeal was precluded:

> The decision by counsel to approach the [future dangerousness] question in the relatively oblique and impersonal terms of quantitative presentation lay at the heart of [the defense team's] trial strategy It included facing the reality that blacks and Latinos had a disproportionate presence in the state prisons, a social phenomenon about which counsel could not assume the jury was ignorant. This approach avoided the necessity of personal testing and examination, the door opener to examination by experts engaged by the State.

Granados, 455 F.3d at 535–36. Unlike the testimony Dr. Quijano gave in Granados's and Buck's trials, the testimony he gave in Saldaño's trial specifically indicated that a defendants' race would make him more likely to be a future danger and that minorities generally are more dangerous. *See Saldaño*, 267 F.Supp.2d at 638–39 ("Quijano testified that Saldaño's Hispanic ethnicity increased the likelihood that he would be a danger in the future. Quijano explained that Hispanics were overrepresented in the Texas prison system, *and to him this fact suggested a correlation between ethnicity and future dangerousness*.") (emphasis added). Where those remarks were

inherently aggravating, Dr. Quijano's brief remarks during his testimony in Buck's trial about "minorities, Hispanics and blacks" being overrepresented in the criminal justice system, 28 RR 111, are inherently mitigating.

C. Buck cannot establish resultant prejudice.

Buck tells this Court that "the State's evidence of future dangerousness was far from overwhelming." Petition at 17 This is a myopic view of the record. As the district court has explained:

> In addition to Buck's past history, the jury was aware of the horrific facts of Buck's murder of [Debra] and [Kenneth]. These included Buck's attempt to murder his own sister, and his murder of [Debra] in front of her two children. The jury also heard that Buck was laughing about the murders when he was arrested, and that he said about [Debra] that 'the bitch deserved what she got.'

Buck v. Stephens, Civil Action No. 4:04cv03965, DE 66 at 12–13; *see also id.*, DE 31 at 6 ("The penalty phase evidence showed that Buck had a history of domestic violence, including threatening his ex–girlfriend with a gun, shot his own sister during the rampage that resulted in the murders of [Debra] and [Kenneth], showed no remorse for the murders, and laughed when asked about the murders.").

Ultimately, the jurors were instructed that they were "not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling in considering all of the evidence before [them] and in answering" the future dangerousness special issue. CR 194. And in closing

argument, the prosecution only reminded the jurors of what they had already heard: "[W]hat [Dr Qujiano] said was that [Buck] was at the low range but the probability did exist that he would be a continuing threat to society " 28 RR 261.

Richter teaches that the likelihood of prejudice must be "substantial," not simply conceivable." 526 U.S. at 112. While a different outcome might be "conceivable" without Dr. Quijano's testimony, that likelihood is simply not "substantial." The jurors heard that Buck was prone to violent outbursts, particularly against women, the most damning being the shooting spree he went on in response to Debra's having left him. Indeed, that he shot Debra—twice, once as she lay dying in the street—in front of her children could only be described as vicious and abhorrent. But his behavior in the aftermath was more vicious and more abhorrent, as he laughed in response to a question by the arresting officer and then said, without remorse, "The bitch got what she deserved."

Because Buck has not shown the denial of a valid constitutional claim, a COA was not warranted. Thus, the lower court did not err, and certiorari review should be denied.

CONCLUSION

There is no question that State-sponsored discrimination is not to be tolerated. *See, e.g., Miller-El v. Dretke*, 545 U.S. 231 (2003); *Turner v Murray*,

476 U.S. 28 (1986); *Zant*, 462 U.S. 862; *Rose v. Mitchell*, 443 U.S. 545 (1979). But what the State cannot do, the defense can. Given the callousness of Buck's crime and his behavior afterward, counsel made the best decision he could. That is, to approach the question of Buck's future dangerousness in terms of clinical and statistical data in an effort to have the case viewed on those terms rather than remain focused on" Buck and his cruelty *Granados*, 455 F.3d at 535.

The responsibility foisted on jurors in a capital murder trial is considerable. We cannot blithely assume they do not take it seriously The Court in *Lockett v. Ohio* presumed that "'jurors confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. 586, 598 (1978) (quoting *McGautha v. California*, 402 U.S. 183, 208 (1971)); *see McClesky v. Kemp*, 481 U.S. 279, 311 (1987) ("[I]t is the jury's function to make the difficult and uniquely human judgments that defy codification and that buil[d] discretion, equity, and flexibility into a legal system.") (internal quotation marks and citation omitted). Nothing in the record suggests the jurors here acted in a contrary manner. Certainly the record does not establish that the assessment of the death penalty in this case was a result of Dr. Quijano's single statement that minorities are overrepresented in the criminal justice system –

'a social phenomenon about which counsel could not assume the jury was ignorant." *Granados*, 455 F.3d at 535.

For all of these reasons, the Fifth Circuit did not err in declining to issue a COA. Therefore, this Court should deny certiorari review.

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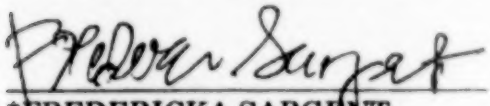

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